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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-331

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER, B. JOHN TUTUSKA,

Appellants,

against

M. RUSSELL TURLEY and ROBERT H. STIEVATER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT

BRIEF FOR APPELLEES

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Questions Presented for Review

The questions presented for review are whether a state may impose a condition upon public contractors requiring them to waive their constitutional privilege against self-incrimination concerning matters not narrowly limited to the public contract and whether public contractors may be penalized for refusing to execute a waiver of immunity covering testimony not narrowly limited to the public contract.

Statement of the Case

Appellees architects were parties to a public contract with the County of Erie, New York and after having been subpoenaed before an Erie County Grand Jury in February, 1971, they were each individually presented with so-called "waivers of immunity" which each read, in part, as follows:

> "I have been advised by District Attorney John J. Honan that the Grand Jury of the County of Erie, now in session, is investigating charges of Conspiracy (Sections 105.00, 105.05, 105.10, 105.15 of the Penal Law); Bribery (Sections 200, 200.10, 200.20, 200.30, 200.35, 200.45, 200.50 of the Penal Law); Larceny (Article 155 of the Penal Law), and other matters of every nature whatsoever appertaining thereto. I am further advised that such charge and investigation may involve me.
>
> No one has made any threats or promises to me whatsoever in connection with my appearance or any testimony that I may give before the Grand Jury. I have also been advised by John J. Honan that anything I may say or testify to before said Grand Jury in said investigation can be used against me on the prosecution of any charge or indictment concerning the transactions about which I may testify.
>
> And, with full understanding of my declarations herein, and of my own free will, I hereby expressly waive any immunity that might otherwise come to me because or on account of my appearance or any testimony that I may give before said Grand Jury in connection with said investigation." Appendix 16-18.

Appellees refused to execute the waivers presented and are now subject to cancellation of existing contracts with municipalities and are disqualified from public contracting for a period of five (5) years pursuant to New York General Municipal Law, Sections 103-a and 103-b and Public Authorities Law, Sections 2601 and 2602. Appendix 60-64.

A three-judge District Court in the Western District of New York has held the aforementioned statutes unconstitutional and has enjoined appellants from their further enforcement. Appendix 59.

Summary of Argument

While it is self-evident that compulsory waiver of immunity is an abridgment of the constitutional right against self-incrimination, this Court has held that a state may have a compelling overriding interest which may limit such constitutional right.

Nevertheless, the statutes in question penalize refusal to broadly waive immunity in criminal proceedings and effectively seek to compel self-incriminating testimony beyond the scope of the public contract. This unspecific and broad limitation on constitutional rights is impermissible.

POINT I

The statutes are overbroad in their limitation upon the exercise of the constitutional right against self-incrimination.

Because appellees refuse to waive constitutionally protected rights against self-incrimination, they have been penalized by disqualification to contract with the governmental units for a period of five (5) years and were made subject to concellation of all existing contracts.

Appellees do not argue here that the State does not have an interest in questioning its employees and private contractors. *Garner v. Los Angeles Board*, 341 U. S. 716, 720 (1951); *Slochower v. Board of Education*, 350 U. S. 551, 559 (1956). But they do claim precisely the same rights as the police officers and sanitation workers in *Gardner v.*

Broderick, 392 U. S. 277 (1968) and *Uniformed Sanitation Men's Association v. Commissioner of Sanitation*, 392 U. S. 280 (1968), that is, that the State may not impose "costly" consequences for assertion of constitutionally protected rights. *Malloy v. Hogan*, 378 U. S. 1, 8 (1964).

There is no doubt that at least a plurality of this Court has adopted a so-called "balancing test" by which limitations on constitutional protections may be imposed by the State in favor of overriding State's interests, particularly with respect to the right against self-incrimination:

> "Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably, these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protection on the other; neither interest can be treated lightly." *California v. Byers*, 402 U. S. 424, 427-28 (1971).

Assuming, then, that constitutionally protected rights may be limited in some fashion by the "State's demand for disclosures", such rights should not nevertheless be indiscriminately cast aside:

> "* * * When two principles come in conflict with each other, the Court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded * * *." *United States v. Burr*, 25 Fed. Cases 38, 39 (Cir. Ct. D. Va. 1807).

In *Gardner, supra*, this Court clearly showed the way that both the interests of the State and the rights of the

individual might be, in the judgment of the Court, preserved to a reasonable extent by holdnig that the State may question employees about their "official duties" in which case "the privilege against self-incrimination would not be a bar to [their] dismissal". *Gardner, supra* at 278.

This was expanded upon in *Uniformed Sanitation Men's Association v. Commissioner of Sanitation, supra* at 284-285 quoted in the opinion below, Appendix 58-59:

> "As we stated in *Gardner* * * *, if New York had demanded that petitioners answer questions specifically, directly and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such case, the employee's right to immunity as a result of his compelled testimony would not be at stake. But here the precise and plain impact of the proceedings against petitioners * * * was to present them with a choice between surrendering their constitutional rights or their jobs. Petitioners, as public employees, are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incimination. * * * At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights."

The waivers of immunity offered in this case were not limited to the narrow issues relating to the contract, nor do the statutes in question in any way limit the breadth of the waivers which may be coercively demanded. They simply require a potential defendant "to sign a waiver of immunity against subsequent criminal prosecution." N. Y. General Municipal Law, Sections 103-a, 103-b; General Municipal Law, Sections 2601, 2602. Appendix 10-16 and

60-64. Nowhere in New York State statutes is the term "waiver of immunity" limited, much less defined. Therefore, there is no "fairly possible" construction which might be deemed to bring the terminology "waiver of immunity" within permissible limitations. *United States v. Thirty-Seven Photographs*, 403 U. S. 363, 369 (1971).

Nor is it appropriate for appellants to argue that appellees could have been required to testify under threat of penalty of loss of present and future public contracts under a more narrowly drawn statute. It is not necessary for appellees in attacking overly broad statutes to show that their own conduct could not have been regulated by a statute drawn with requisite narrow specificity. *Dombrowski v. Pfister*, 380 U. S. 479, 486 (1965); *Gooding v. Wilson*, 405 U. S. 521 (1972); and see *Coates v. City of Cincinnati*, 402 U. S. 611, 614 (1971).

The fact is that this Court has consistently required statutes which limit constitutional rights to be reasonably limited to their legitimate purposes:

> "In a series of decisions, this Court has held, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U. S. 479, 488 (1960).

See also *Keyishian v. Board of Regents*, 385 U. S. 589, 602 (1967).

This limitation upon abridgment of constitutional rights beyond that reasonably necessary for legitimate purposes is not restricted to the area of First Amendment freedoms.

This Court in this term has struck down a provision in the New York Civil Service Law prohibiting employment of aliens in competitive civil service positions as violative of the equal protection provisions of the Fourteenth Amendment, although acknowledging the right of the State to impose some restrictions on the employment of non-citizens if "narrowly confined". *Sugarman v. Dougal*, ___ U. S. ___ (June 25, 1973).*

Note that it was upon this point, that is the failure of the New York City Charter Provisions to narrowly limit their restriction upon the exercise of the privilege against self-incrimination, that the full court concurred in *Gardner v. Broderick, supra* and *Uniformed Sanitation Men's Association v. Commissioner, supra*, after the previously divided opinions in *Spevack v. Klein*, 385 U. S. 511 (1968) and *Garrity v. New Jersey*, (385 U. S. 493):

> "• • • I find in these opinions a procedural formula whereby, for example, public officials may now be discharged and lawyers disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices. I add only that this is a welcome breakthrough in what *Spevack* and *Garrity* might otherwise have been thought to portend." *Gardner v. Broderick, Uniformed Sanitation Men's Association, Inc. v. Commissioner of Sanitation, supra*, 285

Appellants argue that an agreement to waive immunity should be read into the contracts, even though the record

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* That decision also reaffirmed the Court's position that "• • • [T]his Court now has rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege'. [*Graham v. Richardson*] dd., 403 U. S. 365 at 374 [1971]. See also *Sherbert v. Verner*, 374 U. S. 398, 404 (1963); *Shapiro v. Thompson*, 394 U. S. 618, 627, n. 6 (1969); *Goldberg v. Kelly*, 397 U. S. 254, 262 (1970); *Bell v. Burson*, 402 U. S. 535 (1971)."

does not indicate that such an agreement was contained in any contracts between the County of Erie and appellees.

Nevertheless, even if such a provision had been contained in such contracts, or even if such provision may be implied through some legal construction, the substantive unconstitutionality of the statutes remains unchanged. This Court has consistently and frequently rejected the premise that public employment may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. *Keyishian v. Board of Regents, supra.* See also *Weiman v. Updedraff*, 344 U. S. 183 (1952); *Slochower v. Board of Education*, 350 U. S. 551 (1956); *Cramp v. Board of Public Instruction*, 368 U. S. 278 (1961); *Badgett v. Bullett*, 377 U. S. 360 (1964); *Shelton v. Tucker, supra; Speiser v. Randall*, 357 U. S. 513 (1958).

POINT II

Threatened loss of existing contracts and disqualification from public contracting for five years is a penalty which may not be imposed upon exercise of Fifth Amendment privilege.

Constitutional provisions for the security of person and property should be liberally construed. *Boyd v. United States*, 116 U. S. 616 (1886). No "penalty" may be imposed upon the right of a citizen "to remain silent unless he chooses to speak in the unfettered exercise of his own will, * * *". *Malloy v. Hogan, supra* at 8.

Spevack v. Klein, supra, held the "threat of disbarment in a loss of professional standing, professional reputation and of livelihood [to be] powerful forms of compulsion to make a lawyer relinquish the privilege."

385 U. S., at 516. Loss of employment has been held an impermissible penalty if consequent upon exercise of Fifth Amendment privileges. *Slochower v. Board of Education, supra, Garrity v. New Jersey, supra, Gardner v. Broderick, supra, Uniformed Sanitation Men's Association v. Commissioner of Sanitation, supra.* And more subtle forms of coercion have been held a "penalty" such as in *Brooks v. Tennessee,* 406 U. S. 605 (1972) in which the requirement that a defendant in a criminal case must choose to take the stand first in his own defense or be precluded from later testifying in his own behalf was held constitutionally impermissible.

Taking into account the expansion of government activities in all fields, it takes little imagination to conclude that the disqualification to contract with the government may be a catastrophic limitation upon architects, engineers and others involved in government contracting. Also, such disqualification of a professional must certainly cast a shadow upon his reputation outside of the sphere of governmental contracting.

The distinctions drawn in appellants' briefs are without a difference under the general principles outlined above. To argue that a public contractor may obtain other contracts does not differentiate the public contractor's position from the policeman who might obtain other employment in private security fields, despite his loss of employment; nor can it be said that a teacher may not seek other employment in private institutions despite his loss of public employment; nor can it be said that a laborer working in the sanitation department in the City of New York may not seek other laboring employment in the event of his discharge for exercising constitutional rights.

Speaking in purely economic terms, disqualification from public contracting may be much more severe than individual loss of employment and unquestionably the effect of disqualification upon professionals such as architects and engineers is much more serious than loss of employment on a sanitation truck.

CONCLUSION

The decision below should be affirmed.

Dated at Buffalo, New York, July 11, 1973.

Respectfully submitted,

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